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No. 03-903

Supreme Court, U.S.
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In The
Supreme Court of the United States

LANTZ WELCH and LANTZ WELCH, P.C.,

Petitioners,

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals – Western District

REPLY BRIEF OF PETITIONERS

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PARTIES

Contrary to Respondents' argument, Timothy L. Brake and Timothy L. Brake, P.C. (collectively, "Brake") are indeed proper parties to this appeal and, therefore, properly designated as Respondents in this action. Respondents flagrantly misstate the record by claiming that Petitioners Lantz Welch and Lantz Welch, P.C.'s (collectively, "Welch") application to compel arbitration was not denied as to Brake. Welch's application – which sought an arbitration with all Respondents – was denied in its entirety. (App. to Pet. for Writ of Cert. 16-21, 31-48). The arbitration that did take place between Welch and Brake alone was the result of a competing application to compel arbitration filed by Brake, which the trial court granted. (App. to Pet. for Writ of Cert. 14-15). Welch's appeal is therefore from the denial of an arbitration with *all* Respondents as parties. Because the question whether Welch's application should have been granted instead of Brake's is still at issue, the validity of the arbitration award in favor of Brake alone also remains at issue. *See infra* at 1-3.

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REPLY BRIEF OF PETITIONERS

I. The Arbitration Award in Favor of Brake Does Not Prevent the Court From Reaching the Question Presented By Welch's Petition.

Respondents' Brief in Opposition attempts to divert the Court's attention from the question presented for review by improper reliance on the arbitration award in favor of Brake. The attempts begin at the outset with the incorrect claim that Brake is not a proper party to this appeal based on the arbitration award. They continue in Respondents' Statement of the Case, where Respondents contend that the arbitration award in favor of Brake is unassailable and that any arbitration between Welch and Davis, Bethune and Jones would therefore be a futile exercise.[1] And this same theme lives on through the first five pages of Respondents' argument, where Respondents claim that the arbitration award renders the case moot.

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[1] Respondents' misleading account of the background of this case does not end with their improper reliance on the arbitration award in favor of Brake. That account continues with the claim that Welch no longer actively practices law. The claim is ironic given that Respondents arrogated to themselves the law practice that Welch spent 40 years building. Respondents also allege that Welch performed no work on any of the cases involved in the present dispute. This argument ignores, however, that all of the cases at issue were handled as Lantz Welch, P.C. cases before Respondents terminated their relationship with Welch. The work that Respondents performed on the cases was therefore done on behalf of Welch's firm, which is entitled to the reasonable value of the services it performed. In his Petition, Welch placed the amount at issue on this point at over $50 million. (Pet. for Writ of Cert. 3 n.1). Respondents did not even attempt to dispute this figure in their opposition.

The arbitration award in favor of Brake, however, does not prevent the Court from reaching the important question presented by Welch's petition. The fatal flaw with Respondents' reliance on the arbitration award to foreclose review is its false assumption that the validity of the award is not an open question.

If this Court grants review and determines that the Missouri Court of Appeals erred in its application of the harmless error doctrine, the issue of whether Welch's application should have been granted will remain for decision. Welch's application sought an arbitration not just with Brake, but with Davis, Bethune and Jones as well. If it is ultimately determined that Welch's application should have been granted – and the dispute submitted to a single arbitration – the trial court's order granting Brake's competing application would be reversible error. Under such circumstances, the arbitration between Welch and Brake alone should never have taken place and should be vacated. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 401-02 (3d Cir. 1994) (remanding with instructions that district court compel not just some, but all parties involved in dispute to submit to arbitration); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980) (same); *In re Globe Seaways, Inc.*, 337 F.Supp. 26, 29 (S.D.N.Y. 1971), *aff'd*, 451 F.2d 1159 (2d Cir. 1971) (ordering that incorrectly entered arbitration would be vacated); *see also Madden v. Ellspermann*, 813 S.W.2d 51, 52, 54 (Mo. App. 1991) (reversing order denying arbitration as to only one of two defendants and remanding with directions that all parties submit the dispute to arbitration).

Respondents' reliance on *Briggs & Stratton Corp. v. Local 232, International Union, Allied Industrial Workers*

of America (AFL-CIO), 36 F.3d 712 (7th Cir. 1994), *IB-TCWHA, Local Union No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178 (9th Cir. 1988), and *Pipe Trades Council of Northern California, U.A. Local 159 v. Underground Contractors Association of Northern California*, 835 F.2d 1275 (9th Cir. 1987), to support their mootness argument does not alter this result. Although all three cases correctly recognize that an arbitration issue, like any issue, can be rendered moot, none of those cases address the type of situation present in this case. Unlike here, where the validity of the arbitration award in favor of Brake is an open question, there was no indication in either *Briggs & Stratton*, *IBTCHWA*, or *Pipe Trades Council* that the very foundation for the mootness claim was still at issue. Those cases instead treat the validity of the event rendering the arbitration moot as a foregone conclusion. Their findings of mootness on appeal therefore have no application in this case.

Respondents' attempt to prematurely foreclose review by relying on the arbitration award in favor of Brake is baseless. This case presents a controversy involving the right to arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq.* that is very much alive. It is therefore an appropriate vehicle to address the question presented for review and the conflict created by the Missouri Court of Appeals' application of the harmless error doctrine.

II. The Missouri Court of Appeals' Rejection of the Right to Arbitration Under the FAA Based on Harmless Error Analysis Directly Conflicts With This Court's Precedent.

Respondents are unable to explain away the direct conflict between this Court's precedent and the Missouri Court of Appeals' application of the harmless error doctrine under Missouri law to defeat the right to arbitration found in the FAA. The most Respondents can muster on this point is to claim that the federal-harmless-error statute, 28 U.S.C. § 2111, justifies the Missouri Court of Appeals' use of harmless error analysis. This argument, however, demonstrates a fundamental misunderstanding of the harmless error doctrine.

This Court's precedent establishes that certain errors are "structural" and therefore outside the reach of harmless error analysis. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In *Fulminante*, the Court identified a class of "structural defects . . . which defy analysis by 'harmless error' standards." *Id.* at 309. Under this rationale, the Court has identified various errors that simply cannot be classified as harmless. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (collecting cases). Even beyond these cases, which involve application of the harmless error doctrine to *trial errors*, there is simply no basis to conclude that harmless error analysis can be applied to defeat a right like the statutory right to arbitration found in the FAA. And Respondents, unsurprisingly, do not cite a single case to support such a proposition.

In addition to being inconsistent with this Court's precedent, Respondents' argument that 28 U.S.C. § 2111 is a federal mandate to conduct harmless error analysis on "any appeal" and in "any case" grossly mischaracterizes

the operation of that statute. Respondents conveniently ignore the language in § 2111 that renders the statute applicable only to "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. This language squares the statute with the notion that harmless error analysis is simply inapplicable to certain errors.

In addition to their specious arguments based on § 2111, Respondents attempt to minimize the role of the Missouri Court of Appeals' harmless error analysis in an effort to avoid review. Respondents claim that the court of appeals' decision was "based primarily" on agency law. But the court of appeals' opinion tells a different story. The court of appeals passed over the agency issue by simply assuming a result without a full analysis. (App. to Pet. for Writ of Cert. 5). Indeed, the court of appeals' entire discussion of the agency issue was relegated to a single footnote because of the harmless error finding. Even setting the agency issue aside, the court of appeals completely ignored Welch's other argument that Davis, Bethune and Jones were compelled to arbitrate based on their status as third-party beneficiaries under the arbitration agreement. (*Id.*) The third-party beneficiary argument was instead usurped by the harmless error finding. Accordingly, any claim that the court of appeals' application of the harmless error doctrine did not dictate the outcome on Welch's right to arbitration under the FAA is disingenuous.

III. The Court of Appeals' Application of the Harmless Error Doctrine Creates a Conflict in Both the State and Federal Appellate Courts.

Respondents fail to meaningfully respond to Welch's showing that the court of appeals' decision creates a conflict in the United States courts of appeals and state

courts of last resort. Respondents have no answer but to say that the numerous decisions cited by Welch do not expressly refuse to apply harmless error analysis to the right to arbitration found in the FAA. But the type of conflict warranting review in this Court is created by different outcomes in different courts. And that is precisely how the court of appeals' decision operates. The court of appeals' opinion is in direct conflict with the cases cited by Welch from other jurisdictions that have never applied harmless error analysis to defeat the right to arbitration found in the FAA. That the federal and state appellate cases outside of Missouri do not explicitly reason that the harmless error doctrine cannot be applied in such a manner does not detract from the conflict that exists. That fact instead serves only to demonstrate how wrong the court of appeals was in applying harmless error analysis to discard Welch's claim that he was denied his right to arbitrate under the FAA.

IV. This Case is Appropriate for Review.

This case squarely presents an important and recurring question that will affect the continued vitality of the statutory right to arbitration found in the FAA. The strong federal policy in favor of arbitration is defeated by the result reached in this case. And the issue will arise whenever an appellate court finds error in a lower court's arbitration ruling under the FAA. Moreover, the conflict between the court of appeals' decision and other jurisdictions is real and substantial. Left untouched, the court of appeals' decision will open the door for courts to simply claim harmless error when faced with difficult arbitrability issues under the FAA.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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